whether the employer has the documentation required in paragraph (b)(3) of this section, and whether the documentation supports the employer's wage attestation. Where the documentation is either nonexistent or is insufficient to determine the prevailing wage (*e.g.*, does not meet the criteria specified in this section, in which case the Administrator may find a violation of paragraph (b)(1), (2), or (3), of this section); *or* where, based on significant evidence regarding wages paid for the occupation in the area of intended employment, the Administrator has reason to believe that the prevailing wage finding obtained from an independent authoritative source or another legitimate source varies substantially from the wage prevailing for the occupation in the area of intended employment; *or* where the employer has been unable to demonstrate that the prevailing wage determined by another legitimate source is in accordance with the regulatory criteria, the Administrator may contact ETA, which shall provide the Administrator with a prevailing wage determination, which the Administrator shall use as the basis for determining violations and for computing back wages, if such wages are found to be owed. The 30-day investigatory period shall be suspended while ETA makes the prevailing wage determination and, in the event that the employer timely challenges the determination through the Employment service complaint system (see § 655.731(d)(2) of this part), shall be suspended until the Employment Service complaint system process is completed and the Administrator's investigation can be resumed.

(2) In the event the Administrator obtains a prevailing wage from ETA pursuant to paragraph (d)(1) of this section, the employer may challenge the ETA prevailing wage only through the Employment Service complaint system. See 20 CFR part 658, subpart E. Notwithstanding the provisions of 20 CFR 658.421 and 658.426, the appeal shall be initiated at the ETA regional office level. Such challenge shall be initiated within 10 days after the employer receives ETA's prevailing wage determination from the Administrator. In any challenge to the wage determination, neither ETA nor the SESA shall divulge any employer wage data which was collected under the promise of confidentiality.

(i) Where the employer timely challenges an ETA prevailing wage determination obtained by the Administrator, the 30-day investigative period shall be suspended until the employer obtains a final ruling from the Employment Service complaint system. Upon such final ruling, the investigation and any subsequent enforcement proceeding shall continue, with ETA's prevailing wage determination serving as the conclusive determination for all purposes.

(ii) Where the employer does not challenge ETA's prevailing wage determination obtained by the Administrator, such determination shall be deemed to have been accepted by the employer as accurate and appropriate (both as to the occupational classification and wage) and thereafter shall not be subject to challenge in a hearing pursuant to § 655.835 of this part.

(3) For purposes of this paragraph (d), ETA may consult with the appropriate SESA to ascertain the prevailing wage applicable under the circumstances of the particular complaint.

(4) No prevailing wage violation will be found if the employer paid a wage that is equal to or more than 95 percent of the prevailing wage as required by paragraph (a)(2)(iii) of this section. If the employer paid a wage that is less than 95 percent of the prevailing wage, the employer will be required to pay 100 percent of the prevailing wage.

§ 655.732 The second labor condition statement: working conditions.

An employer seeking to employ H–1B nonimmigrants in specialty occupations or as fashion models of distinguished merit and ability shall state on Form ETA 9035 that the employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

(a) For purposes of this section, ''similarly employed'' shall mean ''having substantially comparable jobs in the occupational classification at the worksite and in the area of intended employment.'' If no such workers are

employed at the worksite or by employers other than the employer applicant in the area of intended employment ''similarly employed'' shall mean:

(1) Having jobs requiring a substantially similar level of skills at the worksite or within the area of intended employment; or

(2) If there are no substantially comparable jobs at the worksite or in the area of intended employment, having substantially comparable jobs with employers outside of the area of intended employment.

(b) *Establishing the working conditions requirement.* The second labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that for the period of intended employment its employment of H–1B nonimmigrants will not adversely affect the working conditions of workers similarly employed. Working conditions encompass matters including hours, shifts, vacation periods, and fringe benefits. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA or the period during which the H–1B nonimmigrant(s) is(are) employed by the employer.

(c) *Documentation of the working condition statement.* (1) In the event an enforcement action is initiated pursuant to subpart I of this part, the employer shall document the validity of its prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035. The employer must be able to show that the working conditions of similarly employed workers were not adversely affected by the employment of an H–1B nonimmigrant—*e.g.,* that the working conditions are similar to working conditions which preceded the employment of the H–1B nonimmigrant, or, if there are no similarly employed workers working for the employer, are similar to those existing in like business establishments to the employer's in the area of employment.

(2) In the event that an investigation is conducted pursuant to subpart I of this part concerning whether the employer failed to satisfy the prevailing working conditions statement referenced in paragraph (b) of this section and attested to on Form ETA 9035, the Administrator shall determine whether the employer has produced the documentation required in paragraph (c)(1) of this section, and whether the documentation is sufficient to support the employer's prevailing working conditions statement. If the employer fails to produce any documentation to support its burden of proof demonstrating that there is no adverse effect on the working conditions of workers similarly employed, the Administrator shall find a violation of paragraph (c)(1) of this section. Examples of documentation which employers should either maintain or produce include any relevant information which discusses the working conditions for the industry, occupation and locale, such as published studies, surveys, or articles and documentation regarding working conditions at the worksite, such as fringe benefit packages, which pre-existed the employment of the H–1B nonimmigrant. If the documentation is insufficient to determine whether the employment of H–1B nonimmigrants has or has not adversely affected the working conditions of workers similarly employed in the area of employment, the Administrator may contact ETA, which shall provide the Administrator with advice regarding the working conditions of similarly employed workers in the area of employment.

§ 655.733 The third labor condition statement: no strike or lockout.

An employer seeking to employ H–1B nonimmigrants shall state on Form ETA 9035 that there is not at that time a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment. A strike or lockout which occurs after the labor condition application is filed by the employer with DOL is covered by INS regulations at 8 CFR 214.2(h)(17).

(a) *Establishing the no strike or lockout requirement.* The third labor condition application requirement shall be satisfied when the employer signs the labor condition application attesting that, as of the date the application is filed, the employer is not involved in a strike,